33562 SERVICE DATE – NOVEMBER 19, 2003
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
AND UNION PACIFIC RAILROAD COMPANY

Decided: November 18, 2003

In this case Arizona Electric Power Cooperative, Inc. (AEPCO) challenges the joint rates charged by The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) for transporting unit-train movements of coal from mines at North Tipple and Lee Ranch, NM, to AEPCO's Apache Generating Station in Cochise, AZ. AEPCO seeks to demonstrate that those rates are unreasonable by using the stand-alone cost (SAC) test set forth in Coal Rate Guidelines.[1] This decision addresses pleadings filed by the defendant railroads arguing that the complainants' SAC presentation is so deficient that it should not be accepted by the Board.

OVERVIEW

AEPCO filed its rate complaint on December 29, 2000. After a protracted period of procedural and discovery disputes, as well as amendments to the complaint (first to expand the complaint and later to withdraw that expansion), AEPCO filed its opening SAC presentation on February 7, 2003. On April 18, 2003, UP filed a petition to require AEPCO to submit new opening evidence or, alternatively, to dismiss the complaint (April Petition). (While BNSF agreed with UP's substantive objections to AEPCO's opening presentation, it did not join in the April Petition because it did not agree that AEPCO should be afforded an opportunity to submit new opening evidence.) Unfortunately, through an administrative oversight, the April Petition was not addressed by the Board prior to the time when the defendants' reply evidence was due.

[1] Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

BNSF and UP filed replies to AEPCO's opening presentation on May 27, 2003, as scheduled. Their submissions, however, offered no responsive SAC evidence, but merely repeated the claim that the opening SAC evidence was so poorly defined as not to permit a meaningful reply. AEPCO then submitted rebuttal evidence seeking to address some of the deficiencies in its opening evidence that had been pointed out by the defendants. On July 23, 2003, BNSF and UP jointly filed a motion to strike portions of the rebuttal evidence (July Motion).

The Board is reluctant to deny or dismiss a rail rate challenge on procedural grounds or because the record is inadequate, when the defendant railroad has declined to contribute to the development of an adequate record. Rail rate cases are not ordinary commercial litigation, given the regulated nature of rail rates charged to captive shippers. Operating in an industry subject to regulatory oversight of rates charged on captive traffic, railroads have a responsibility to provide information needed by the Board. See 49 U.S.C. 721(b)(3). When a rail rate is challenged, the Board must determine whether the carrier has abused its market power by charging an unreasonable rate to a shipper who has no effective transportation alternative for that traffic. The Board's role differs from that of a court, because the Board is not simply an adjudicator, as it is also charged with carrying out the national rail transportation policy. The Board therefore strives to achieve an appropriate balance so that the adversarial process works in a manner that provides an adequate record upon which the Board may make a fair and informed assessment of the reasonableness of a challenged rate.

Accordingly, in this decision, the Board denies both the April Petition (to dismiss the complaint) and the July Motion (to strike rebuttal evidence). It reopens the record for the submission of additional evidence to allow for a fair and informed decision on the merits of the rate complaint.

BACKGROUND

As shown in the map in the Appendix, the traffic that is the subject of the complaint is currently transported in joint-line service (1) by BNSF from Defiance to Belen, NM, using its main east-west line, then over lighter-density BNSF lines south to Rincon and Deming, NM, and (2) by UP from Deming to Cochise over UP's main east-west line. AEPCO's SAC presentation assumes that the stand-alone railroad (SARR) it posits—the Apache, Cochise & Eastern Railroad (ACE)—would construct and operate the two parallel east-west lines (replicating the Defiance-to-Vaughn, NM portion of BNSF's main line and the El Paso, TX-to-Cochise, AZ portion of UP's main line) but would operate between Vaughn and El Paso using trackage rights over UP under terms that are the same as those contained in a trackage rights agreement that BNSF has with UP. The ACE's traffic group is designed to include all traffic now moving over the segments of the BNSF and UP east-west main lines replicated by the ACE, but only the issue traffic on the Vaughn-to-El Paso north-south segment.

In the April Petition, UP argued that AEPCO's opening presentation was so flawed that defendants could not develop meaningful reply evidence and that AEPCO's opening presentation should therefore be rejected. As pertinent here, UP complained (1) that the ACE traffic group was indecipherable and (2) that it is inappropriate for a SAC analysis directed at testing the reasonableness of a joint rate to exclude the costs of constructing and maintaining a portion of the line by assuming use of trackage rights over one of the defendants.[2] AEPCO replied to that motion, (1) clarifying that the ACE's traffic group would consist of all BNSF traffic moving over the BNSF east-west line segment to be replicated and all UP traffic moving over the UP east-west line segment to be replicated and (2) arguing that its use of trackage rights of one defendant over another is appropriate and expressly permitted by the Board decision in this proceeding served August 20, 2002 (August 2002 Decision).

There was no Board action on the April Petition prior to the date scheduled for the defendants' evidentiary submissions. Accordingly, the defendants submitted timely replies but, consistent with the position set out in the April Petition, defendants provided no responsive or alternative SAC evidence. Instead, they simply identified alleged flaws in AEPCO's SAC presentation. On rebuttal, AEPCO attempted to correct the flaws in its traffic group evidence. In the July Motion, defendants contend, as pertinent here, that it was improper for AEPCO to revise the traffic group on rebuttal, particularly in view of its representation (in its reply to the April Petition) that it would not do so. In responding to the July Motion, AEPCO contends that it did not revise its traffic group, but merely corrected the revenues shown for that traffic.

DISCUSSION

The April Petition and July Motion raise serious concerns, and the evidentiary record must be supplemented for the Board to have an adequate record upon which to assess the reasonableness of the challenged rates.

Traffic Group

As UP has correctly pointed out, AEPCO's opening evidence did not reflect existing traffic levels over the east-west line segments that would be replicated by the ACE. That is because AEPCO had improperly adjusted the traffic data that it had obtained in discovery to conform to what it viewed as inconsistent train movement data also obtained in discovery. AEPCO had mistakenly concluded that the train movement data reflected more traffic than the traffic data it had been supplied in discovery,

[2] UP also argued that there was insufficient information to support the revenue allocation assigned to the ACE by AEPCO for cross-over traffic, but that issue need not be separately addressed here, as the issue is not novel and supplemental evidence is not needed for the Board to be able to resolve that issue. (AEPCO's SAC presentation does not contain any rerouting of non-issue traffic.)

and to reconcile the seeming inconsistency between the two databases AEPCO adjusted the traffic figures upward. As a result, AEPCO improperly treated some empty movements (for example, returns of empty containers) as loaded movements, and defendants were thus unable to reconcile AEPCO's traffic figures with their actual traffic. Indeed, for some categories of traffic AEPCO's traffic figures for the ACE exceeded the existing carrier's systemwide traffic levels.[3]

Defendants claim that, because the traffic figures used by AEPCO on opening did not correspond to any real-world figures, they could not determine what traffic group AEPCO had intended to use. However, no traffic group can be greater than a defendant's existing traffic base (for which defendants had all the data needed to respond), and AEPCO's opening presentation contained no indication that AEPCO had intended to limit the group to a smaller subset of that traffic. Moreover, any room for doubt or confusion was removed by AEPCO's clarification, in its response to the April Petition, that it had intended to include all traffic currently moving over those lines. Thus, contrary to the defendants' claim, the errors in the traffic figures used in AEPCO's opening presentation neither precluded nor excused the railroads from submitting responsive SAC evidence.

To the extent that the submission of the new traffic figures on rebuttal can be viewed as merely correcting the errors identified by the defendants in AEPCO's opening evidence, the new traffic figures are directly responsive to the defendants' criticisms and do not constitute improper rebuttal. See Duke Energy Corp. v. Norfolk S. Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) at 13-15 (addressing proper role of rebuttal). If, on the other hand, the substantially different traffic figures on rebuttal were viewed as a significant change in AEPCO's case-in-chief, it would nevertheless be allowable if the defendants were afforded an opportunity to respond to that evidence. Thus, regardless of how the new traffic figures are characterized, the Board will accept that evidence here. But to ensure that a fair and adequate record is developed for the Board to assess the reasonableness of the challenged rates, the Board will provide an opportunity for the defendants to submit responsive SAC evidence, and for AEPCO to address the defendants' evidence.

Trackage Rights

As noted above, although the complaint has since been reduced back to its original scope, for a period of nearly 2 years AEPCO pursued a broader amended complaint that would have embraced coal rates from Colorado and Powder River Basin (Wyoming and Montana) mine origins. The defendants objected to the prospect of AEPCO combining into a single SAC analysis rate challenges for service from separate regions hundreds of miles apart, moving over lines with different physical characteristics and traffic patterns, and moving in different types of service (some in joint-line service and others in single-line service). In the August 2002 Decision, the Board addressed that objection,

[3] BNSF Reply Narr. at I-10.

explaining that for each of the three sets of challenged rates, AEPCO could not include any traffic or revenues (or exclude any costs) that could not have been treated in the same manner had AEPCO filed a separate complaint for that set of rates.

The Board's August 2002 Decision also provided guidance on the permissible contours of the SAC analysis that AEPCO had indicated that it intended to present for each part of the combined complaint. See August 2002 Decision at 4. First, the Board confirmed that the SAC analysis for AEPCO's coal movements from the New Mexico mines to Cochise need not reflect the current routing of that traffic but could use a routing through Vaughn and El Paso. Id. at 6. It then explained that, in testing the reasonableness of single-line rates, the SAC analysis could not combine UP and BNSF traffic as AEPCO had anticipated, id. at 4, although it could reflect existing cost-sharing arrangements between carriers, id. at 6-7. With respect to the challenged joint-rate movements, the Board stated (id. at 7) that

> only the traffic and revenues of the carrier whose portion of the route is being replicated should be included in the SARR's traffic group. But the SARR may be assumed to have the same cost-sharing arrangements as the defendant carriers have on each segment, so long as the terms of those arrangements (including operational provisions and terms of compensation) are the same as those applicable to the defendant carriers.

Relying on that statement, AEPCO has now presented a SAC analysis that assumes that the ACE could avoid the costs of building and maintaining the Vaughn-to-El Paso line segment by replicating a BNSF trackage rights agreement to use UP's line. That is not what the Board contemplated in the August 2002 Decision; rather, the Board was addressing AEPCO's suggestion that, to "take advantage of traffic densities" (id. at 4), its anticipated SARR would replicate (i.e., construct and maintain) the heavily used UP north-south line segment instead of the lighter used BNSF north-south line segment. The Board noted that, in doing so, the SARR could also get the benefit of any cost-sharing arrangements (i.e., receipts from other carriers that might pay a usage fee for operating over that line segment). But the Board cautioned that "[a]ny SAC presentation must necessarily be grounded in, and bounded by, what is reasonable and appropriate to serve the purpose of the SAC test," and that the assumptions made in SAC cases are always open to challenge and scrutiny to ensure that this purpose is met. Id. at 5.

The purpose of the SAC test, of course, is to evaluate the reasonableness of challenged rates by eliminating costs of inefficiencies and cross-subsidies. To do this, the Board seeks to determine whether a hypothetical new, optimally efficient entrant, serving only traffic designated by the complainant, could provide service at a lower rate while covering the full costs of providing service, including a reasonable return on investment.

As UP and BNSF point out, when applied to a joint rate, the SAC test could not serve its purpose if the SAC analysis failed to take into account the full costs of providing and maintaining the physical plant needed to serve the traffic—costs which the joint-rate defendants collectively must bear. UP and BNSF rightly distinguish joint-rate situations from situations where a defendant carrier has an existing arrangement with a third party. Incorporating into a SAC analysis cost-sharing or cost-saving arrangements with third parties is fully consistent with the SAC principle that a SARR should not incur costs that the defendant carrier does not or need not incur. But using such arrangements between joint-rate defendants to avoid a significant portion of the capital costs of providing service would defeat the SAC test. Here, there is good cause to believe that the existing usage fee would not be adequate to reflect the full SAC costs of providing service over the Vaughn-to-El Paso line segment. Cf. Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 415 & n.168 (1996) (discussing estimations that the usage fee contained in the UP/BNSF trackage rights agreement for that line would yield compensation of 3.84 mills per gross ton-mile, whereas to fully compensate UP the usage fee would need to yield 8.32 mills per gross ton-mile under an annuity method or 9.05 mills per gross ton-mile under a replacement-cost-new-less-depreciation method).

It would not be appropriate, however, to dismiss AEPCO's case on this ground, in view of the Board's statements in the August 2002 Decision and the expectations that may have been created. Nor will the Board require AEPCO to prepare an entirely new case-in-chief at this late date. Rather, in view of the special circumstances here, AEPCO will be allowed to rely on its rebuttal SAC presentation as its case-in-chief, if it does not wish to prepare a new case-in-chief. However, if AEPCO chooses to rely on its rebuttal SAC evidence, the defendants will be entitled to demonstrate the inadequacy (for purposes of the SAC analysis) of the usage fee reflected in the existing BNSF-UP trackage rights agreement and to show the level at which a usage fee would need to be set to satisfy the objectives of the SAC test. AEPCO would then have an opportunity to present rebuttal evidence on that issue. A schedule for the submission of this supplemental evidence is set forth here; however, the parties are encouraged to jointly propose a more accelerated schedule, if possible.

CONCLUSIONS

The April Petition (to dismiss the complaint) and the July Motion (to strike rebuttal evidence) will be denied. AEPCO should notify the Board and the defendants, within 7 days, whether it wishes for the case to proceed using its already-filed rebuttal evidence as its case-in-chief or whether it wishes to submit a new case-in-chief. In either event, the procedural schedule will be revised to permit the record to be supplemented with responsive SAC evidence by the defendant railroads, followed by a responsive submission by AEPCO.

It is ordered:

1. The April Petition and July Motion are denied.

2. AEPCO shall notify the Board and the defendants by November 26, 2003 whether it wishes to file new opening evidence or to rely on the evidence that it filed in July 2003.

3. If AEPCO chooses to rely on its July 2003 evidentiary submission, defendants' supplemental reply evidence and argument will be due by January 26, 2004 and AEPCO's supplemental rebuttal will be due by February 24, 2004.

4. If AEPCO chooses instead to file supplemental evidence and argument, that submission will be due by January 26, 2004, defendants' supplemental reply evidence and argument will be due by March 25, 2004, and AEPCO's supplemental rebuttal will be due by April 26, 2004.

5. This decision is effective on November 19, 2003.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

APPENDIX

Exhibit III-A-1
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Schematic of the Apache, Cochise & Eastern Railroad